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No. 94-1706

In The

Supreme Court of the United States

October Term, 1994

THE MILL, a limited partnership,

Petitioner,

vs.

STATE OF COLORADO, DEPARTMENT OF HEALTH, and THE TREASURER FOR GUNNISON COUNTY, COLORADO,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Colorado

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GEORGE ALAN HOLLEY
Counsel of Record
ERIC E. TORGERSEN
HOLLEY, ALBERTSON & POLK, P.C.
1667 Cole Boulevard
Suite 100, Building 19
Golden, Colorado 80401
(303) 233-7838

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

The Mill incorporates the Questions Presented for Review in its Petition.

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding.

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STATEMENT OF THE CASE

The Petitioner, The Mill ("The Mill") incorporates the Statement of the Case in its Petition.

ARGUMENT

I.

WHEN DOES THE FIFTH AMENDMENT REQUIRE THAT JUST COMPENSATION NOT BE MEASURED STRICTLY BY THE FAIR MARKET VALUE OF THE LAND TAKEN?

Respondent, State of Colorado, Department of Health ("CDOH"), suggests that this case is not worthy of this

Court's time or effort because the court below applied Colorado's rule that the ordinary measure of compensation in a condemnation case is the property's fair market value at the time the property is taken, *e.g., Williams v. City and County of Denver,* 147 Colo. 195, 198-202, 363 P.2d 171, 173-175 (1961). CDOH also argues that by demanding the decontaminated value, The Mill seeks to recover the value of its property enhanced by the cost of remedial actions undertaken by the United States Department of Energy ("DOE"). Instead, CDOH claims that The Mill should gratefully accept a zero condemnation award in return for being relieved of some enormous potential liability for the cleanup of its land.

The Mill believes this case merits review precisely because the court below ignored the Fifth Amendment Takings Clause when it affirmed The Mill's zero condemnation award. Instead of following the Fifth Amendment and applying fairness and equity principles as this Court has instructed, *see, e.g., United States v. Commodities Trading Corp.,* 339 U.S. 121, 70 S.Ct. 547, 94 L.Ed. 707 (1950), the court below embarked on a Supremacy Clause preemption analysis in order to apply Colorado's general condemnation precedent, App. 20-22.

CDOH attempts to distract this Court from the question raised by The Mill, i.e., when does the Fifth Amendment require the State to determine the value of condemned property by other than the ordinary measure, by characterizing it as a mere state law squabble. This Court has never suggested, however, that the Takings Clause is mere surplusage. *See, e.g., First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987).

All of The Mill's 61 acres of land is environmentally contaminated with radiation through no fault of The Mill. Under the Uranium Mill Trailings Radiation Control Act of 1978, 42 U.S.C. §§ 7901-7942 (1988) ("UMTRCA"), DOE must remediate the property, *see* 42 U.S.C. § 7912 (1988), as well as the twenty-one other designated "processing sites," 42 U.S.C. § 7912, at no cost to the respective property owners, including The Mill, *see* 42 U.S.C. § 7917 (1988). DOE could have elected to clean up and return the property to The Mill, as the Denver trial court assumed would happen, App. 140-141. Instead, DOE directed CDOH, as its agent, to condemn the property in fee before DOE conducted any remedial action.

This Court has been asked to depart from the "rule against enhancement" in other cases, *e.g., United States v. 50 Acres of Land,* 469 U.S. 24, 105 S.Ct. 451, 83 L.Ed.2d 376 (1984), but this Court has never been squarely asked to consider whether an owner's land can be worth nothing under the Fifth Amendment. In this case, this Court can identify the parameters of when and under what circumstances the Fifth Amendment requires a departure from the general rule this Court has laid down in order to put the owner "in as good [a] position pecuniarily as he would have occupied if his property had not been taken," *United States v. Miller,* 317 U.S. 369, 373, 63 S.Ct. 276, 279-280, 87 L.Ed. 336 (1943).

CDOH suggests that Congress could have abandoned the cleanup program it established in UNTRCA. Congress's ability to change its mind, however, did not invest DOE with discretion to perform remedial action at less than all designated sites, *see* 42 U.S.C. § 7912. Because DOE has a statutory duty to clean up every "designated

processing site" at no cost to the owner, whether or not the cooperative State acquires the property, 42 U.S.C. §§ 7912, 7917, the cost of cleanup cannot be considered an enhancement in the value of The Mill's property for determining condemnation value, *cf. 50 Acres*, 469 U.S. at 24. Here, CDOH has already condemned and taken The Mill's property but has not yet paid The Mill "just" compensation. Had DOE "borrowed" The Mill's property[1] and returned it after performing the necessary remedial action, CDOH could not have demanded that The Mill contribute to the remedial action plan costs. Likewise, the Fifth Amendment does not require The Mill to donate its property to CDOH in order to keep UMTRCA program costs to a minimum. The Mill cannot be made whole unless it receives the decontaminated value of its land.

II.

WHEN DOES A STATE'S REGULATION OF LAND SO INTERFERE WITH THE OWNER'S REASONABLE INVESTMENT-BACKED EXPECTATIONS THAT IT EFFECTS A COMPENSABLE TAKING?

CDOH asserts that whether The Mill acquired its land with reasonable investment-backed expectations is a question of state law which does not implicate the Fifth Amendment or merit this Court's review. In part, CDOH would ignore, as did the court below, the findings Judge Bayless made after hearing a six-day trial, in order to

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[1] Even under this hypothetical scenario, The Mill would have lost the improvements on the property.

present as "facts" evidence which Judge Bayless considered and rejected when he decided that CDOH effected a regulatory taking of the mill yard parcel, App. 122-146. *Cf. M.D.C./Wood, Inc. v. Mortimer,* 866 P.2d 1380 (Colo. 1994) (trial court's findings are binding on appellate review). CDOH would have this Court overlook the regulatory conduct, Brief in Opposition at 22, by which CDOH delicensed the mill yard in 1971 and later engaged in a "series of restrictive" communications and acts which together amounted to a regulatory taking of that mill yard, App. 129.

This Court should accept review in this case to settle whether a landowner's constructive notice of a State's existing regulations can defeat the landowner's reasonable expectations formed at the time he invests in and acquires his land. Although "in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the possibility that new regulation might even render his property economically worthless," *Lucas v. South Carolina Coastal Council,* ___ U.S. ___, ___, 112 S.Ct. 2886, 2899, 120 L.Ed.2d 798 (1992); *compare Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1006, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984) (commercial trade secrets); *Golden Pacific Bancorp v. United States,* 15 F.3d 1066 (Fed. Cir.), *cert. denied,* ___ U.S. ___, 115 S.Ct. 420 (1994) (ownership in a bank), this high degree of State control over personal property cannot be constitutionally extended to land. "In the case of land, . . . the notion . . . that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact

recorded in the Takings Clause that has become part of our constitutional culture," *Lucas*, 112 S.Ct. at 2900.

The question of "how the owner's reasonable expectations have been shaped by the State's law of property," *Lucas*, 112 S.Ct. at 2984, n.7, necessarily involves State law in answering the Fifth Amendment question of whether the State's later conduct effects a regulatory taking of land. However, this Court's takings cases presuppose that a landowner forms investment-backed expectations for his property merely by purchasing the land, *e.g.*, *Lucas*, 112 S.Ct. at 2889; *First English*, 482 U.S. at 304, and "evince [not only] an abiding concern for the productive use of, and economic investment in, land, [but also for] a number of noneconomic interests in land whose impairment will invite exceedingly close scrutiny under the Takings Clause," *Lucas*, 112 S.Ct. at 2985, n.8.

In 1973, The Mill paid $260,000 for 61 acres of industrially-zoned[2] land in Gunnison, Colorado, adjacent to the local airport. At that time, the approximately 25-acre mill yard had been delicensed by CDOH and declared safe for unrestricted use. Based upon CDOH's prior termination of license no. SUA-809, The Mill purchased the entire 61 acres, including the approximately 35 acre tailings pile which remained subject to CDOH licensure. As Judge Bayless found, App. 137-138, The Mill was entitled to rely on that license termination when it purchased the land and formed investment-backed expectations for its future use, *see Loveladies Harbor, Inc. v. United States*, 28

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[2] At the time of The Mill's purchase, the entire 61 acres was zoned for industrial use. Up to the Denver trial, the land had been used for industrial or commercial purposes.

F.3d 1171, 1183 (Fed. Cir. 1994); *see also Monsanto*, 467 U.S. at 1005 (a reasonable investment-backed expectation must be more than a unilateral expectation or an abstract need).

CDOH also argues that The Mill could have been prevented from using its land for any purpose on the premise that Colorado's common law would have permitted CDOH to abate a nuisance on The Mill's property. *Cf. Lucas*, 112 S.Ct. at 2900-2902. This Court's cases, however, "have never applied the nuisance exception to allow complete extinction of the value of a parcel of property. Though nuisance regulations have been sustained despite a substantial reduction in value, [this Court has] not accepted the proposition that a State may completely extinguish a property interest or prohibit all use without providing compensation." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 513, 107 S.Ct. 1232, 1256, 94 L.Ed.2d 472 (1987) (Rehnquist, J., dissenting); *cf. Lucas*, 112 S.Ct. at 2900 ("We believe similar treatment must be accorded confiscatory regulations, *i.e.*, regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.")

In the Denver trial, Judge Bayless found that The Mill had not committed a nuisance on its property, App. 135, and that fact was binding on appeal, *Mortimer*, 866 P.2d at 1380. Nevertheless, the court below effectively reversed this finding. App. 14-17. Contrary to CDOH's bald assertions, the court's decision cannot be "defended [as an]

objectively reasonable application" of Colorado's "relevant precedents" which would "exclude those beneficial uses in the circumstances in which the land" was found at the time of trial, *see Lucas*, 112 S.Ct. at 2902, n.18.

The Mill does not concede that the court below properly considered nuisance law as part of its determination of The Mill's reasonable expectations for its property. *See* Petition at 27. However, assuming that *Lucas* contemplates this type of analysis, this Court remains the final arbiter of whether CDOH could constitutionally rely on Colorado's common law of nuisance to preclude The Mill from using its property for any purpose, *see Lucas*, 112 S.Ct. at 2902, n.18. Although State law must be evaluated to determine this issue, the question is appropriate for this Court's review.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

GEORGE ALAN HOLLEY
Counsel of Record
ERIC E. TORGERSEN
HOLLEY, ALBERTSON & POLK, P.C.
1667 Cole Boulevard
Suite 100, Building 19
Golden, Colorado 80401
(303) 233-7838

Attorneys for Petitioner